

STATE OF TENNESSEE

Office of the Attorney General



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Reply to:  
Consumer Advocate and Protection Division  
Post Office Box 20207  
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February 6, 2002

Mr. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

**RE: In re: Show Cause Proceeding Against Talk.com d/b/a Talk America, Inc.  
Docket No. 01-00216**

Dear Mr. Waddell:

Enclosed is an original and thirteen copies of our Brief in Opposition to Talk.com's Request to Take Depositions of Complaining Witnesses in the above-referenced matter. We request that this be filed in this docket with the Tennessee Regulatory Authority. We have served copies on all parties of record. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Shilina B. Chatterjee".

Shilina B. Chatterjee  
Assistant Attorney General

Enclosures

**IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	) <b>DOCKET NO. 01-00216</b>
	)
<b>SHOW CAUSE PROCEEDING</b>	)
<b>AGAINST TALK.COM</b>	)
<b>d/b/a TALK AMERICA, INC.</b>	)
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	)
	)

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**BRIEF IN OPPOSITION TO TALK.COM'S REQUEST TO TAKE DEPOSITIONS OF  
COMPLAINING WITNESSES**

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**INTRODUCTION**

Comes Paul G. Summers, the Attorney General & Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General of the State of Tennessee (hereinafter "Attorney General") in response to briefs filed by the Consumer Services Division of the Tennessee Regulatory Authority ("CSD") and Respondent, Talk.com, Inc

On November 8, 2001, the Tennessee Regulatory Authority ("TRA") issued a Show Cause Order ("Order") to Talk.com. The CSD asserted a total of 149 counts against Talk.com for slamming, cramming and "Do Not Call" violations. Thereafter, Talk.com filed a Brief in Support of Request to Take Depositions of Complaining Witnesses in this matter on January 14, 2002. Thereafter, CSD responded on January 15, 2002 in their Brief in Opposition to Deposing the Consumers Included in the Show Cause Order. In addition, on January 16, 2002, the CSD filed a Response of the Consumer Services Division to Talk.com's Brief in Support of Request to Take Depositions of Complaining Witnesses. On February 1, 2002, the TRA issued an Order

granting the Petition to Intervene that was filed by the Attorney General of the State of Tennessee.

## **ARGUMENT**

### **I. TENNESSEE CONSUMERS SHOULD NOT BE REQUIRED TO APPEAR FOR DEPOSITIONS SINCE A LESS BURDENSOME MEANS IS AVAILABLE FOR TALK.COM TO OBTAIN THE INFORMATION THAT THEY SEEK**

As stated in the *Brief in Opposition to Deposing the Consumers Included in the Show Cause Order* filed by the Consumer Services Division of the Tennessee Regulatory Authority (“CSD”), the CSD does not contest Respondent Talk.com’s right to conduct discovery. They merely state that there is a less burdensome means to obtain the requested information.<sup>1</sup>

Talk.com has received the complaints that form the basis of this proceeding by the TRA and the CSD has opened their files to Talk.com for review and inspection.<sup>2</sup> Furthermore, Talk.com can contact the consumers that have filed the complaints and gather additional information.

Therefore, a less burdensome means is available to Talk.com rather than subjecting consumers to lengthy, time-consuming depositions that may not be necessary.

Discovery would be unduly burdensome in this proceeding if Talk.com were permitted to conduct over 100 depositions. Tenn. Comp. R. & Reg 1220-1-2-.11 clearly states that discovery should not be burdensome. Tenn. Comp. R. & Reg 1220-1-2-.11(1) states “[p]arties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand.”<sup>3</sup> Here, discovery can

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<sup>1</sup> TRA Brief in Opposition at 4.

<sup>2</sup> TRA Brief in Opposition at 4

<sup>3</sup> Tenn. Comp. R. & Reg 1220-1-2-.11(1)

easily be done informally and with minimal expense. Also, Talk.com can obtain the necessary information they are seeking and prepare their defense based on the written complaints of consumers and informal interviews with consumers.

Furthermore, Talk.com has not contacted consumers and merely assumes that consumers will not be willing to speak to them or will not be forthright concerning the complaints they filed. Since Talk.com has not made an attempt to contact consumers and they do not know whether they can or cannot obtain additional information from other discovery methods, it is premature to allow any request to take depositions at this juncture. Informal discovery is clearly more practicable and depositions should not be permitted until Talk.com has exhausted other avenues to obtain the necessary information.

Relevant information in this matter is available to Talk.com through other means and allowing depositions in this matter would be unreasonably cumulative and unduly burdensome. Rule 26 of the Tennessee Rules of Civil Procedure provides the general provisions governing discovery. TENN. R. CIV. P. 26. Tennessee Rules of Civil Procedure 26.02(1) permits limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome. Tennessee Rules of Civil Procedure 26.02(1). Since Talk.com already has access to all unprivileged information from the CSD and they can conduct informal interviews with complaining witnesses, it is not necessary to conduct depositions in this proceeding because it would be unreasonably cumulative or duplicative, obtainable from another source and unduly burdensome.

Conducting depositions in this matter will not result in the discovery of facts that are not already known and/or available by other means. The purpose of TENN. R. CIV. P. 26.02(1) is to

allow for discovery of facts which “will enable litigants to prepare for trial free from the element of surprise . . .” *Strickland v. Strickland*, 618 S.W. 2d 496, 501 (Tenn. Ct. App. 1981). In this proceeding, Talk.com has been given copies of all complaints that were filed by consumers. These complaints provide Talk.com with adequate detail and information concerning each complaint by the consumer. Moreover, the CSD has allowed them to have access to all relevant, unprivileged information in this matter including their own investigation. Further, Talk.com can conduct informal interviews with consumers. Under TENN. R. CIV. P. 26.02(1) discovery is unnecessary since all relevant facts are in hand and there is not an element of surprise in this proceeding.

**II. IN THE EVENT THAT DEPOSITIONS ARE PERMITTED, THE SCOPE OF DISCOVERY SHOULD BE LIMITED BY THE TENNESSEE REGULATORY AUTHORITY**

The request to depose 105 witnesses during the course of discovery in this matter would be unduly burdensome, overly broad, irrelevant and not reasonably calculated to lead to discoverable matters in light of the availability of information provided by consumers in written complaints, an investigation conducted by the CSD and availability of conducting consumer interviews by Talk.com.

The fact that Talk.com seeks such extraordinary discovery suggests other motives beyond proper just merely obtaining discovery. If discovery of this nature is allowed, the Tennessee Regulatory Authority should restrict the number of depositions in this matter since conducting over 100 depositions would result in a significant delay, exorbitant expense and would result in a logistical nightmare. The Tennessee Rules of Civil Procedure do not define all circumstances where discovery should be limited, rather, the rule leaves it to the trial court’s discretion to

decide the discovery restrictions that are necessary. *Duncan v. Duncan*, 789 S.W.2d, 557, 560 (1990). Therefore, the TRA should limit the number of depositions to a reasonable number not to exceed twenty (20) depositions and restrict the time period available for Talk.com to thirty (30) minutes per deponent at a location convenient to the consumer. This will allow the case to proceed forward and not delay this proceeding. Denying the discovery or at least limiting it will inhibit exacerbating the pain these consumers have already suffered.

Since a less burdensome means for acquiring information is available to Talk.com, they should not be permitted to conduct such an astonishing number of depositions. Tennessee Rules of Civil Procedure 26.03 provides that a trial court can limit discovery if less burdensome means for acquiring the requested information are available. *Duncan v. Duncan*, 789 S.W.2d, 557, 561 (1990). Talk.com can obtain the information for their defense through informal interviews and other discovery that is available to them.

Depositions should be severely limited since conducting depositions in this case would not only be duplicative, but would result in an undue burden to consumers and result in substantial cost to all interested parties. Discovery may be limited if it proves to be expensive, duplicative, unduly burdensome, or if there is more efficient sources to obtain the information. 3 Tennessee Practice 440 (2d ed. 1989). Therefore, since Talk.com can obtain information from the consumer complaints and other sources, the TRA should restrict the number of depositions that are allowed.

By requiring consumers to appear for a deposition would result in annoyance, undue burden and expense for all 105 consumers that Talk.com is seeking to depose. A court has broad discretion in limiting or prohibiting discovery of relevant and non-privileged information in order

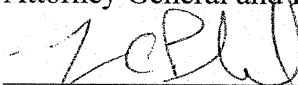
to prevent "annoyance, embarrassment, oppression or undue burden or expense . . . ." FED R. CIV. PRO. 26(c). Most of these consumers have already been harmed as a result of the acts and practices of Talk.com. Most consumers have suffered a financial loss and if they are required to appear for a deposition, it would result in further expenses and cause an undue burden on these consumers.

### CONCLUSION

For the foregoing reasons, the Attorney General of the State of Tennessee submits that depositions of the complaining witnesses should not be allowed in this proceeding. Allowing depositions would result in undue delay, duplication, tremendous expense and would be unduly burdensome.

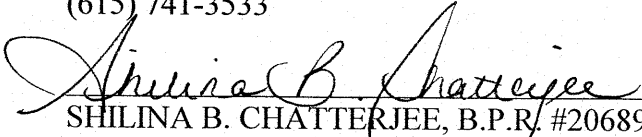
Respectfully submitted,

PAUL G. SUMMERS  
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DATED: February 6, 2002

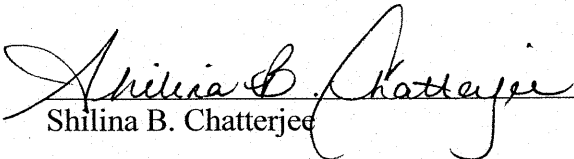
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile on February 6, 2002.

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